IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

Arbitration Petition (Ld) No.353 of 2007

1. M/s K.M.Developers and others ..Petitioners

vs.

1.Anant Girdharlal Shah and others ..Respondents

Mr.Satyajit Sen with Mr.Aniket Bhatt i/b I.B.Law Point for petitioners.
Mr.Ranjit Shetty i/b M/s PDS Legal for respondents

CORAM: S.C.DHARMADHIKARI J.
6th July, 2007

P.C.

1. This petition is filed by the original claimants praying to this Court that the order passed by the Arbitrator in interim application No.23 of 2007 in Arbitration Petition Nos. 22, 23, 24, 25, 26 and 37 of 2001 be set aside and this Court should remove the learned Arbitrator who has been appointed as a sole Arbitrator to adjudicate upon the disputes and claims between the petitioners/original claimants and the respondents herein.

2. It is not necessary to burden this order with the factual details regarding the arbitration proceedings. Suffice it to state that both sides do not dispute that the Arbitrator is seized of the claims which have been

presented before him. The sole Arbitrator had to step in as the earlier sole Aribtrator expired. The sole Arbitrator, now appointed in July, 2005 has commenced the arbitration proceedings and the matter is at the stage of arguments. The application is moved by the petitioners/original claimants alleging that the conduct of the learned Arbitrator and the proceedings has given rise to a justifiable doubt with regard to his independency or impartiality. That grievance was projected in the written objections filed before the Arbitrator and upon the same being rejected by him, present Arbitration petition is filed in this Court.

3. A preliminary objection is raised on behalf of the respondents to the maintainability of this petition and my attention is invited to sections 12 and 13 of the Arbitration and Conciliation Act, 1996. It is contended that once the Arbitral Tribunal has rejected the objections in as much as the challenge is not successful, then the Tribunal is obliged to continue the arbitral proceedings and make an Award. Such Arbitral Award is also capable of being challenged by filing an application under section 34 and by virtue of sub-section (5) the Award could be challenged also on the ground of independency or impartiality of the Arbitral Tribunal. In

such circumstances, the petition of the present nature is not maintainable. Reliance in this behalf is placed on the decision of this Court reported in 2000(3) Bombay C.R.672 (Mr.Hasmukhlal H.Doshi and another Vs. Mr.Justice M.L.Pendse and others). In the submission of Mr.Shetty appearing for the respondents, this judgment clearly holds that the petition of the present nature is not maintainable and deserves to be dismissed only on that ground.

4. A grievance is made by the petitioners' Counsel contending that this judgment was considered by another learned single Judge of this Court and disagreeing with the view taken by the earlier single Judge, he has requested that the matter be referred to a Larger Bench to resolve the conflict of maintainability of such a petition.

5. It is in this context and not deciding the issue of maintainability in these proceedings, that I permitted the parties to raise their contentions on merits of the application and challenge to the Arbitral Tribunal's Independency or Impartiality.

6. The learned Counsel for the petitioners thereafter

contended that the grounds which give rise to a justifiable doubt about the independence or impartiality of the Arbitral Tribunal can be summarised as hereinbelow.

7. The first objection is that the Arbitral Tribunal consisting of the sole arbitrator had heard the parties on an interim application in the month of January, 2007. After hearing the parties, no order was passed but it was stated that the order would be pronounced later. The parties were requested to supply the requisite stamp papers. The requisite stamp papers were supplied. The stamp papers are of 2nd/3rd March, 2007. However, when the copy of the order was forwarded to the parties it was noticed that the sole Arbitrator had signed the order and below the signature the date appeared as that of "29.1.2007". In such circumstances, the order is either backdated or that the stamp papers utilised by the Tribunal clearly demonstrate that the order is not made on the same. It is contended that the order is nothing but an interim award and, therefore, is required to be issued on a stamp paper. It is in this context that a justifiable doubt arises with regard to the independence or impartiality of the Arbitral Tribunal.

8. The second grievance projected before me is that the

sole Arbitrator is in communication with the respondents' Counsel outside the venue of Arbitral proceedings. A communication with regard to the fees of the learned Arbitrator, which in any event were to be shared by the parties, could not have reached the hands of the respondents or in any event their Counsel. The matter was between the petitioner/original claimants and the Arbitrator. All the fees were duly paid and if at all there was any outstanding dues the matter was to be resolved by the petitioner and the Arbitrator. That it was so resolved is clear but the communication with the respondents and their Counsel gives rise to a justifiable doubt of such a nature as would endanger the independence or impartiality of the Arbitrator.

9. The third ground is that the Arbitral Tribunal has not been fair in recording the minutes of the meeting. There was no meeting held on 21st April, 2007. Yet, the Arbitral Tribunal has recorded that there was a meeting. It is pertinent to note, according to the learned Counsel for the petitioners, that the venue of the arbitral proceedings was not agreed upon. No notice was given of the meeting which is alleged to have been taken place at the venue, date and time recorded in the minutes. Thus, recording something which is not proper once again gives

rise to a reasonable belief, which is justified as well, with regard to the independence or impartiality of the Arbitrator.

10. My attention is also invited to the developments during the course of challenge to the independence or impartiality of the Arbitrator. According to the learned Counsel the application which was filed challenging the Authority and Jurisdiction of the Arbitral Tribunal to proceed in the face of these allegations has not been dealt with fairly in as much as the Arbitrator initially did not take cognisance of the application at all. The same was on record of the Arbitral Tribunal's proceedings. In such circumstances, the petitioners had to approach this Court making a grievance about the conduct of the Arbitrator. It is only upon an order being passed by this Court that the application was taken up by the learned Arbitrator. In such circumstances, and the manner in which the same has been dealt with and decided gives rise to a justifiable reason doubting his independence and impartiality. The matter is pending before the Arbitral Tribunal for the last two years. The Arbitral Tribunal goes on giving dates frequently. In such circumstances, it is not clear as to why the proceedings are suddenly rushed in and the matter sought to be decided

expeditiously. The learned Arbitrator in the face of the challenge to his independence and impartiality has decided to proceed with the matter and despite the issue pending in this Court he has gone ahead and conducted the proceedings.

11. For all these reasons, Mr.Sen, learned Counsel appearing for the petitioners, urged that this petition be allowed and Arbitrator be removed forthwith.

12. On the other hand Mr.Shetty learned Counsel appearing for the respondents, contends that the petition is nothing but an abuse of process of this Court. An identical petition was filed earlier and this Court has refused to entertain the same. The grounds and objections were also identical. The prayers are identical. In such circumstances, this petition should not be entertained.

13. Even otherwise the grounds or reasons, which are necessary to justify the allegation that the Arbitrator is not independent or impartial, have to project a grievance which is serious enough. Casual or loose allegations are not enough. If the challenge is raised to the impartiality and independence of the Arbitral Tribunal, then, such challenge has to be substantiated. In the

present case there is no such material. My attention is invited to the fact that on 29th January, 2007 interim application was heard by the Arbitral Tribunal. After hearing the claimants and also the respondents the Arbitral Tribunal passed the order on the same date and at the same venue i.e. on 29th January, 2007. All that the learned Arbitrator did was to request the parties to supply him the stamp papers so that the interim order/award could be transcribed on the same. Such stamp papers were supplied and it is true that they were supplied in March, 2007. After the order was transcribed thereon the learned Arbitrator has signed the same but purely by inadvertence and error he has put the date of 29th January, 2007. It is pointed out that the order passed on 29th January, 2007 in presence of the parties is the same which has been transcribed or typed on the stamp papers. Therefore, a mere error on the part of the Tribunal is not enough to conclude that the Tribunal is not independent and impartial. My attention is invited to the stamp papers which are at pages 297 and 475 of this paper book. My attention is also invited to the fact that between August, 2005 to July, 2007 about 24 interim applications were filed by the parties out of which 7 are by the respondents and rest by the claimants. During the course of hearing of so many interim application, an error

is bound to occur and merely because the same has occurred, the petitioners cannot make any capital and allege bias against the Tribunal. The petition is completely misconceived and contains reckless and irresponsible allegations.

14. As far as the second objection is concerned in the presence of the parties the fees of the Arbitrator were agreed. The manner in which the same were to be paid was also agreed. The receipt is also clear in as much as the Arbitral Tribunal gives an Account of fees collected and expenses incurred almost after every sitting of the Tribunal. The parties are supplied with the copy of the statement of account and it is futile to urge that the respondents and the Arbitrator communicate privately regarding this matter. It is unfortunate that the petitioners resort to making such allegations against the Arbitral Tribunal. The petitioners were in fact in arrears of payment of fees. In such circumstances, they cannot turn round and allege bias against the Arbitrator, more so, when the parties consented to the appointment.

15. With regard to the meeting held and there being no record of the same it is pointed out by Mr.Shetty that there was a meeting held on 21st April, 2007. The minutes

of such meeting are at page 223. When the petitioners allege that their consent was not taken with regard to this meeting or the venue thereof it is inconceivable that their representative's presence would be recorded in the minutes. The authenticity or genuineness of the said minutes is not doubted. In such circumstances, this grievance is also baseless.

16. With regard to conduct of the Arbitrator in going ahead with the matter the respondents contend that the Arbitrator must not be blamed at all. The matter is pending before him for 2 years and more. If he decides to go ahead because there is no impediment or obstacle in proceeding further, then, he cannot be faulted at all. There was no interim order of this Court staying the proceeding. Further, all that remains to be done is to hear both sides and allow tendering of written arguments subsequently and conclude the matter. The petitioners are deliberately delaying the proceedings. By alleging bias against the Arbitrator all that they want to do is to postpone the adjudication of their claim. If the Arbitrator does not permit such course of action he cannot be faulted.

17. For all these reasons the respondents pray that the

petition be dismissed.

18. After hearing both sides and with their assistance perusing the petition and annexures thereto including record of the Arbitration proceedings, I am satisfied that the allegations are baseless and unsustainable. There is much substance in the contention of the respondents that the Arbitrator has committed an error which is genuine and sincere while putting the date on the stamp papers. The stamp paper is of 2nd March, 2007. The Arbitrator has not made the Interim order/Award on the date of purchasing the stamp paper. The order was made by him in presence of the parties on 29th January, 2007 and that is not disputed by the petitioners' Counsel as well. If at all the Arbitrator, through inadvertence, puts the date of 29th January, 2007 below his signature on the stamp paper does not mean that the order has been backdated or pronounced later. The Arbitrator indeed has passed the order/interim award on 29th January, 2007 and if the parties inform him that they will purchase the stamp paper and supply it later and it is the same order which is typed on a stamp paper. Therefore, the allegation/objection is wholly unfounded and unsubstantiated. The same deserves to be rejected and is accordingly rejected.

19. With regard to the fees of the Arbitral Tribunal and communication with the respondents' Counsel there is no substance in this objection as well. It is not as if the respondents' Counsel is aware of the fact that fees are outstanding. The statement of account, the copies of which are placed before me, reflects the payments made from time to time and expenses incurred. Fees of the Arbitrator are agreed by both sides. They have been determined in their presence. The manner of payment is also fixed by consent of the parties. In such circumstances, assuming that there is some oral communication with regard to the outstanding fees with the Counsel appearing before the Arbitral Tribunal, that does not mean that the Arbitrator has shown any bias or is acting in such manner as would doubt his independence or impartiality.

20. Such allegations are frequently made. They are not substantiated with the seriousness that is expected during the course of such challenge. Ultimately, the Arbitral Tribunal is a domestic Tribunal selected by the parties. The appointment in the present is by consent and even procedure of Arbitration, under the 1996 Act, can be agreed upon. In such circumstances, the petitioner/original claimants were expected to go ahead

with the adjudication with all seriousness. They cannot make a grievance with regard to the fees or that the Arbitral Tribunal is not concluding the proceedings expeditiously when their conduct is equally blameworthy. It is in this backdrop that I find that the objections do not give rise to any justifiable doubt about the independence or impartiality of the Arbitral Tribunal. The circumstances that are pointed out fail to give rise to such a justifiable doubt.

21. The third ground with regard to the meeting of the Arbitral Tribunal on 21st April, 2007 is also baseless. At page 227 of the petitioner's paper book, it has been recorded that the meeting was held on Saturday the 21st April, 2007. While it is true the Advocate of the claimants was present however, the minutes of the earlier meeting held on 24th March, 2007 would demonstrate that the parties knew that there would be subsequent meeting. In this behalf what has also been annexed to the petition paper book is a copy of the earlier petition. List of dates and events/synopsis to the said petition itself would demonstrate that a meeting was fixed on 21st April, 2007. This is the time when the claimants became aware allegedly of the arbitrator signing the stamp paper. Therefore, they decided to challenge the independence and

impartiality of the Arbitrator. There is a clear reference in the letter dated 16th April, 2007 which the claimants wrote to the learned Arbitrator, of rescheduling the meeting of 21st April, 2007 to other date. It is thereafter that the claimants completed the procedure of filing the written objections in pursuance of their case that the Arbitral Tribunal is not independent or impartial. There is a reference to the correspondence and the respondents clarified that this aspect would be dealt with in the meeting of 21st April, 2007. The claimants also objected to the venue by addressing a letter dated 21st April, 2007 and recording in the letter that they are not agreeable to the meeting being held on UPS Stores, Mumbai. Thereafter, they protested and pointed out that they would not appear in the meeting scheduled on 21st April, 2007. They did not get any response to their written communication, it is petitioners' case that their representative was attending the meeting scheduled on 21st April, 2007 under protest and without prejudice to the rights of the claimants. This is the time when the earlier nAdvocate for claimants resigned from the proceedings.

22. If this is the case of the claimants themselves then it is futile to urge that the meeting was scheduled

without concurrence and consent of the parties either to the date, time or venue. It is pertinent to note that what transpired in the meeting of March, 2007 was starting point for the petitioners to doubt the Arbitrator's impartiality or independence and that is how they corresponded with him. That is how they reckoned the issue of stamp paper, fees and venue as well. Having held that these objections do not give rise to any justifiable doubt, I do not see any point in entertaining grievances about the meeting of 21st April, 2007, as well, more so, when I am of the opinion that there is no substance in them.

23. The conduct of the arbitration proceedings is also put in issue but having perused the entire petition with the assistance of the learned Counsel appearing for the petitioners, I find absolutely nothing therein to substantiate these contentions. Merely because the claimants or the parties are unsuccessful at some stage or the other before the Arbitral Tribunal is by itself no ground to doubt the independence or impartiality. This aspect, as pointed out above, is a serious matter and objections of such nature are not to be raised casually and lightly.

24. Having found that each of the objection is baseless, unfounded and unsustainable there is no reason for me to entertain this petition. The petition is accordingly dismissed. Since this is a second petition filed by the petitioners on the same grounds and as I am of the opinion that the grounds and objections are baseless and wholly unsubstantiated, it is a fit case for imposing costs which I quantify at Rs.10,000/-

25. The learned Counsel for the respondents undertakes to file their vakalatnama, if not already filed, within a period of one week from today.

(S.C.DHARMADHIKARI J.)